In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1833

HAL FRANCIS RACHAL, PETITIONER

v.

UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends he was entitled to credit against his sentence for time he spent on bail prior to trial since the bail bond restricted him to travel within the Western District of Texas and therefore amounted to confinement.

Petitioner was convicted of thirteen counts of conspiracy, mail fraud, sale of unregistered securities, and securities fraud, in violation of 15 U.S.C. 77q (a) and 77e(a)(2), and 18 U.S.C. 1341 and 371. See *United States* v. *Rachal*, 473 F.2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927. He was sentenced to

five years' imprisonment and fined $10,000 on Count 13. He was also sentenced to five years' imprisonment on Counts 1-12, to run concurrently with the sentence on Count 13. Petitioner filed a class-action petition for a writ of mandamus under 28 U.S.C. 1361, praying that the court order the Bureau of Prisons to credit the time spent on bail against time to be served under his sentence. The district court dismissed the petition on the grounds that the contention was frivolous. The court of appeals affirmed without opinion (Pet. App. A-1).

1. It is well established that a bail bond restricting travel is not a form of custody that a prisoner is entitled to have credited against his sentence. As was stated in *Polakoff* v. *United States*, 489 F.2d 727, 730 (C.A. 5) (footnotes omitted):

> The "custody" contemplated by Section 3568 is that characterized by incarceration; a federal sentence does not begin to run, and credit thus accrue, until the prisoner is received at the place of imprisonment. *Scott* v. *United States*, 5 Cir. 1970, 434 F.2d 11, 21 (per curiam). Polakoff, in effect, seeks a determination that he was "serving time" while free on bond, merely because he was under restrictions. We must agree with the Ninth Circuit that "[t]here is no reason for treating time spent on bail as jail time." *Sica* v. *United States*, 9 Cir. 1971, 454 F.2d 281, 282 (per curiam).
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> The Supreme Court's decision in *Hensley* v. *Municipal Court* [411 U.S. 345] * * * does not compel a contrary conclusion. *Hensley* stands for the limited proposition that a state prisoner

> Who has exhausted his state remedies and has been released on his own recognizance pending application for federal relief is "in custody" within the meaning of the federal habeas corpus statute, Title 28, United States Code, Sections 2241(c)(3) and 2254(a). Nothing in the opinion intimates an intention to allow federal prisoners sentence credit for time spent free on bond; by its very terms the decision is a limited one. See *Cochran* v. *United States*, 5 Cir. 1974, 489 F.2d 691, which reaches a similar conclusion.

Accordingly, the petition was properly dismissed as frivolous.

2. Moreover, there are alternative grounds, not raised below, on which the district court's dismissal of the petition could have rested.

It is well established that mandamus under 28 U.S.C. 1361 is not available unless "three elements * * * coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Amaya* v. *United States Board of Parole*, 486 F. 2d 940, 943 (C.A. 5), vacated and remanded on other grounds, June 24, 1974, No. 73-1209; see *Peoples* v. *United States Department of Agriculture*, 427 F. 2d 561, 565 n.9 (C.A.D.C.). With particular regard to the first two criteria, it has been said that "[t]he purpose of mandamus is not to establish a legal right but to enforce one already established * * *." *United States ex rel. American Silver Producers' Ass'n* v. *Mellon*, 32 F. 2d

415, 418 (C.A.D.C.), certiorari denied, 280 U.S. 561. For the reasons noted (*supra*, pp. 2-3), it cannot be said that petitioner's claimed right to credit against his sentence was clearly established. Moreover, petitioner had another adequate remedy available—habeas corpus. Indeed, because he is a prisoner challenging "duration of his confinement * * *" and "seeking immediate or speedier release from that confinement—the heart of habeas corpus" [1] (*Preiser* v. *Rodriquez*, 411 U.S. 475, 489, 494, 498), his sole remedy would appear to be habeas corpus. It is well established, however, that mandamus cannot be used as a substitute for habeas corpus. *McMurtrey* v. *Clark*, 157 F. 2d 703, 704 (C.A.D.C.), certiorari denied, 329 U.S. 805 ("mandamus never lies except where there is no other remedy and here habeas corpus is still available"); *Taylor* v. *United States Board of Parole*, 194 F. 2d 882, 883 (C.A.D.C.); *Amaya* v. *United States Board of Parole*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[1] The only relief petitioner sought was a crediting of time on bail against his sentence, which would normally result in speedier release from confinement. The case presents no question as to jurisdiction over claims concerning conditions of confinement.

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